Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Section 90.631	)	
Of The Commission's Rules To	)	RM-
Eliminate The Trunked System	)	
Five-Year Loading Requirement	)	

To: The Commission

PETITION FOR RULE MAKING OF THE AMERICAN MOBILE TELECOMMUNICATIONS ASSOCIATION, INC.

Respectfully submitted,

AMERICAN MOBILE TELECOMMUNICATIONS ASSOCIATION, INC.

By: _____

Alan R. Shark, President
1835 K Street N.W., Suite 203
Washington, D.C. 20006

Of Counsel:

Elizabeth R. Sachs, Esq.
Lukas, McGowan, Nace & Gutierrez
1819 H Street, N.W., Suite 700
Washington, D.C. 20006
(202) 857-3500

October 29, 1993

Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Section 90.631	)	
Of The Commission's Rules To	)	RM-
Eliminate The Trunked System	)	
Five-Year Loading Requirement	)	

To: The Commission

PETITION FOR RULE MAKING
OF THE
AMERICAN MOBILE TELECOMMUNICATIONS
ASSOCIATION, INC.

The American Mobile Telecommunications Association, Inc. ("AMTA" or "Association"), pursuant to Section 1.401 of the Federal Communications Commission ("FCC" or "Commission") Rules and Regulations, respectfully requests the initiation of a rule making proceeding to eliminate Section 90.631(b) of the Commission's Rules regarding the five-year trunked loading requirement for both 800 MHz and 900 MHz systems at the earliest opportunity.[1] In a separate filing, AMTA requests that the FCC stay immediately all channel recovery actions based on that rule, pending final action on the instant Petition.

---

[1] 47 C.F.R. § 90.631(b). The relief requested is limited to the take back of those trunked channels not considered to be fully loaded at the five-year loading deadline. AMTA continues to support the current loading requirements for system expansion and the acquisition of additional capacity within forty miles, as modified in the Associations' still pending, rural multi-site Petition. Notice of Proposed Rulemaking, PR Docket No. 89-553, 4 FCC Rcd 8673 (1989); First Report and Order and Further Notice of Proposed Rulemaking, PR Docket No. 89-553, 8 FCC Rcd 1469 (1993); Order, PR Docket No. 89-553, 8 FCC Rcd 3974 (1993). AMTA also supports a continued preference for fully loaded systems in all channel recovery programs.

I. INTRODUCTION

1. AMTA is a nationwide, non-profit trade association devoted to the interests of the SMR industry. AMTA's members include large and small operators of trunked and conventional 800 MHz and 900 MHz SMR facilities throughout the country. The Association and its members have consistently supported FCC rules which promote appropriately intensive utilization of valuable spectrum resources. However, they have also urged the Commission to recognize certain fundamental distinctions between systems in different marketplaces and to modify its regulatory scheme as appropriate to reflect the maturation of the SMR industry.[2] AMTA's request to eliminate the five-year loading requirement is consistent with those precedents.

II. BACKGROUND

2. The FCC first introduced loading standards, i.e., a specified number of mobile/control units per frequency, to the private land mobile radio services in 1970. Loading requirements were originally intended to help determine whether a licensee had used assigned channels to full capacity and thereby qualified for additional spectrum, to enable the Commission to set standard levels of channel occupancy, and to provide potential users with a method to determine channel availability and the degree to which sharing would be required.[3] The FCC extended loading to the 800 MHz band (and subsequently to the 900 MHz band) to further these objectives.[4]

---

[2] Notice of Proposed Rulemaking, PR Docket No. 89-553, 4 FCC Rcd 8673 (1989).

[3] First Report and Order, Docket No. 18261, 23 FCC 2d 325 (1970).

[4] Memorandum Opinion and Order, Docket No. 18262, 51 FCC 945 (1975); Second Report and Order, Docket No. 79-191, 90 FCC 2d 1281 (1982).

3. Section 90.631(b) of the Commission's Rules specifies the loading requirement applicable to trunked systems. It provides that applicants must certify that a minimum of seventy (70) mobiles for each channel authorized will be placed in operation within five years of the initial license grant. If at the end of five years the trunked system is not loaded to the prescribed levels and all channels in the licensee's category are assigned in the system's geographic area, authorization for channels not loaded to one hundred (100) mobiles per channel cancels automatically.[5]

4. This requirement has been used to recover channels from licensees with systems which are not fully loaded so that those frequencies can be reassigned either to a new licensee or to a licensee seeking to expand a system in a geographic area with spectrum shortages. The rule was adopted at a time when there was serious concern that significant numbers of channels could be assigned but unused,[6] and proved an efficient mechanism for promoting full channel utilization during the industry's formative years.

5. However, as the industry and end-user demand matured, the number of channels recovered for failure to satisfy the five-year loading requirement decreased dramatically.[7] The Commission itself recognized in PR Docket No. 86-404 that "the rapid development of the SMR industry and of end-user demand for service have created strong incentives for SMR operators to use their channels efficiently and intensively."[8] Consequently, the FCC decided to eliminate

---

[5] 47 C.F.R. § 90.631(b).

[6] Memorandum Opinion and Order, Docket No. 18262, 51 FCC 945 (1975); Second Report and Order, Docket No. 79-191, 90 FCC 2d 1281 (1982).

[7] Report and Order, PR Docket No. 86-404, 3 FCC Rcd 1838 ¶ 66 (1988).

[8] Id.

the use of that standard as a trigger for automatic cancellation of underloaded channels. However, rather than abolishing the requirement immediately, the Commission adopted a transition period "to allow for business planning and to avoid shock to the market that an abrupt change might cause."[9] The agency modified its rules to impose a five-year loading requirement only for systems licensed before June 1, 1993. All licensees authorized initially before that date which are within their original license term are subject to this condition. Systems licensed after that date will be permitted to retain all constructed, operational frequencies, irrespective of their level of utilization.[10]

6. It has now been five years since the Commission elected to "sunset out" the five-year loading requirement. As detailed below, AMTA is persuaded that the best interest of the industry, the FCC, and the public will be served by the immediate elimination of the requirement. While it could be perceived as inequitable to change this type of fundamental requirement after numerous parties have been adversely affected, that result will occur in any event because of the already adopted "sunset" provision. The change proposed by AMTA will simply accelerate the point at which the Commission would "level the playing field" for all trunked licensees, whether granted before or after the arbitrary June 1, 1993 date.

III. ELIMINATION OF THE FIVE-YEAR LOADING REQUIREMENT WOULD SERVE THE PUBLIC INTEREST AND WOULD BE CONSISTENT WITH THE FCC'S OBJECTIVES.

7. It is no longer necessary to use stringent loading standards to assure appropriately

---

[9] Id. ¶ 67.

[10] 47 C.F.R. § 90.631(b). The FCC has also granted 900 MHz SMR licensees a two-year extension to satisfy the five-year loading requirement. See, Report and Order, PR Docket No. 92-17, 7 FCC Rcd 4914 (1992).

intensive spectrum usage by SMR systems.[11] The SMR industry is entrepreneurial in nature and highly competitive.[12] The marketplace in which these systems operate effectively mandates that spectrum be used to serve customers, rather than be warehoused. Virtually all geographic areas in the nation, even essentially rural areas, are served by a variety of system operators diligently marketing their service to as broad a customer base as possible. The burgeoning SMR market, far from tolerating frequency hoarding, has exerted pressure on operators to use their assigned spectrum intensively. Moreover, there is no rational basis for distinguishing between systems licensed initially before versus after June 1, 1993, in respect to system loading.

A. **Loading Does Not Necessarily Reflect Optimal Levels of Spectrum Utilization.**

8. The Commission has already concluded that the current units per channel loading standard is not necessarily the only, or even the optimal, means of evaluating spectrum usage. For example, in the Order establishing the Finder's Preference Program, the FCC "conceded...that loading is a dynamic concept that, by its very nature, can vary from day to day."[13] In the NPRM proposing a wide-area SMR licensing procedure, the Commission questioned whether counting mobiles per frequency was an appropriate method for determining system capacity and tentatively concluded not to apply loading standards to such systems.[14]

---

[11] AMTA's discussion will focus on SMR licenses both because it is that industry which the Association represents and because non-SMR channel recovery based on loading has been significantly less rigorous.

[12] The intensely competitive nature of the SMR marketplace is detailed in Appendix B to Southwestern Bell Corporation's September 18, 1992 Request for Permanent Waiver of Rule Section 90.603(c) to permit wireline ownership of SMR stations.

[13] Report and Order, PR Docket No. 92-79, 7 FCC Rcd 5558 ¶ 49 (1992).

[14] Notice of Proposed Rule Making, PR Docket No. 93-144, FCC 93-257, 8 FCC Rcd ___ § 37 (1993).

9. One basis for the Commission's seeming evolution away from rigid loading requirements for channel retention purposes is the agency's recognition that the current standard effectively dictates a preference for dispatch versus interconnected communications. While that regulatory "tilt" may have been appropriate in the industry's earlier years when the majority of systems were in urbanized markets where dispatch capacity was urgently needed, the same is not necessarily true today.

10. Most urban systems have reached their five-year loading deadlines and have either satisfied the loading requirement or had channels recovered. More rural systems were not typically at risk in the past because channel recovery actions based on loading were triggered by spectrum shortages. If no waiting list existed, frequencies were not recoverable at the five-year date. More recently, an extraordinary interest in SMR spectrum on the part of traditional SMR operators, wide-area applicants and purely speculative application mill-generated filings have created spectrum deficiencies in areas where available capacity remains significantly underutilized. Customers in many of these markets need substantial interconnect capability in addition to, or even in lieu of, dispatch service. Systems in those areas may be serving their particular communities well, with an appropriate menu of service offerings, and yet be incapable of satisfying an urban-focused, dispatch-oriented loading standard. Having invested in full system implementation, they should not be penalized because the communication needs of the marketplace they serve are not reflected in the loading rules.

B. The Commission's Current Construction and Operation Requirements Provide the Means for Deterring Speculators and for Recovering Channels That Are Not Used.

11. The Commission's current construction and operation requirements provide

sufficient means for deterring speculators and for recovering any channels that are genuinely unutilized. Sections 90.631(e) and (f) of the FCC's Rules require a licensee to construct and place a trunked system in operation within one year of license grant.[15] A licensee who fails to do so loses the authorization for unconstructed frequencies. Additionally, FCC Rule Section 90.157 specifies that any station which has not operated for one year or more is considered to have permanently discontinued operation, and the associated license cancels automatically regardless of whether the Commission has been so notified.[16] Furthermore, to ensure that SMR licensees construct and operate the facilities for which they are licensed rather than establish temporary operations for brief periods, the FCC has determined that an SMR license will cancel automatically if the licensee discontinues operation for a period in excess of 60 consecutive days and fails to file written notification of the discontinuance with the Commission.[17]

12. The Finder's Preference Program is specifically designed to assist the FCC in recapturing unused channels. "The purpose of establishing a finder's preference is to encourage those active in the private land mobile industry to assist [the FCC] in monitoring the radio

---

[15] 47 C.F.R. § 90.631(e), (f).

[16] 47 C.F.R. § 90.157.

[17] First Report and Order and Further Notice of Proposed Rule Making, PR Docket No. 89-553, 8 FCC Rcd 1469 ¶ 55 (1993). By Order dated May 28, 1993, the Commission suspended the enforcement of this provision until it rules on AMTA's pending Petition for Reconsideration. Order, PR Docket No. 89-553, FCC 93-279, 8 FCC Rcd 3974 (1993). That Petition does not challenge the 60 consecutive days of discontinuance of operation leading to cancellation portion of the Order. Rather it contests the requirement that a licensee whose reason for prolonged discontinuance is rejected by the FCC must resume operation within five days of receipt of the rejection notice or risk the automatic cancellation of his license.

environment."[18] It supplements FCC compliance efforts by identifying licensees who have failed to construct, place in operation, or continue to operate their system.[19] It provides incentives to persons to assist the FCC in recovering 800 MHz and 900 MHz channels for non-compliance with the Commission's construction or operational rules. This marketplace monitoring of the SMR industry has been largely successful in accomplishing the Commission's objective.[20] Nonetheless, the Commission has specifically stated that loading violations would not be a basis for an award of a dispositive preference. As noted earlier, the agency recognized "that loading is a dynamic concept that, by its very nature, can vary from day to day and that it is difficult to generate conclusive evidence of loading violations."[21] AMTA would also expect that the FCC might properly differentiate frequency warehousing to deter competition from an inability to satisfy an essentially arbitrary loading standard because of market conditions beyond the control of the licensee.

C. FCC Resources Should No Longer Be Devoted to Five-Year Loading Analyses in Light of Extensive Short-Spacing.

13. The Commission is entering an era of unprecedented austerity in respect to budget, manpower, and all other resources. Each of its programs must be scrutinized closely to determine both its cost and its likely benefit. In AMTA's opinion, the ongoing extensive use

---

[18] Notice of Proposed Rule Making, PR Docket No. 90-481, 5 FCC Rcd 6401, 6404 ¶ 21 (1990).

[19] Report and Order, PR Docket No. 90-481, 6 FCC Rcd 7297 (1991).

[20] The August 18, 1993 list of Finder's Preference Filings reveals that there have been 214 Requests filed from January 21, 1992 to August 18, 1993. Of the 141 upon which the Commission has reached a determination, 59 awards were granted.

[21] See *supra* note 13.

of the short-spacing provisions in the FCC's rules have made the five-year loading assessment an academic, typically fruitless exercise in the very markets in which channel recoveries might otherwise have been productive.

14. As described previously, the FCC's rules permit channel recovery for failure to load fully only in wait-listed markets. Even there, the Commission will take frequencies back only if they can be reassigned to a pending applicant in conformance with the normal co-channel separation standard specified in FCC Rule Section 90.621(b).[22] That separation typically requires seventy (70) miles between co-channel systems.

15. In recent years, both wide-area and traditional SMRs have made extensive use of the FCC's rules and policies regarding short-spacing by requesting the co-channel assignment of frequencies at less than the normal distance separation. Those rules and policies have been amended a number of times over the past few years, and are currently governed by the so-called "40/22 dBμ Table" in that same rule section.[23] Because short-spacing has become relatively commonplace, and because the FCC will reassign recovered channels only on a routine seventy (70) miles basis, the FCC often undertakes a loading analysis only to discover that the underutilized channels are not able to be assigned to a wait list applicant because they have already been short-spaced in that area. For example, it is highly unlikely that any frequencies would be recoverable in the state of Florida due to intensive short-spacing by wide-area and other SMR applicants. Thus, loading analyses more and more frequently are ineffective at accomplishing the reassignment of underutilized frequencies. The benefits of continued

---

[22] 47 C.F.R. § 90.621(b).

[23] Id.

enforcement have become outweighed by the associated administrative costs.

D. The June 1, 1993 Cutoff Date is Arbitrary.

16. As previously mentioned, there is no rational basis for distinguishing between systems licensed initially before versus after June 1, 1993, in respect to system loading. This arbitrary dividing line has the effect of creating a two class SMR industry with no discernible public interest basis. It creates a situation whereby two otherwise identical systems in the same market, perhaps at the same site, will be subject to dramatically different requirements only because one was picked up from the processing pile on May 31st and the other on June 1st. While this inherently inequitable situation will exist irrespective of the "cutoff" date selected, the public interest and the industry will be better served by correcting the imbalance at the earliest opportunity.

V. CONCLUSION

17. By all applicable criteria, the SMR industry has been a resounding success. It serves more than a million subscriber units with minimal FCC oversight. Customers on today's SMR systems enjoy the high quality of service and low costs typical of a highly competitive market environment. The industry is sufficiently mature to warrant the immediate elimination of the five-year system loading requirement. Doing so will allow the Commission to redirect scarce resources to matters of higher priority.

18. For the reasons described above, AMTA urges the Commission to adopt a Notice of Proposed Rule Making to amend Section 90.631(b) of the Commission's Rules[24] consistent with the recommendations herein at the earliest opportunity.

---

[24] 47 C.F.R. § 90.631(b).

CERTIFICATE OF SERVICE

I, Lisa K. Jackson, a secretary in the law office of Lukas, McGowan, Nace & Gutierrez, hereby certify, that I have on this 29th day of October, 1993 caused to have hand-delivered and federal-expressed a copy of the foregoing **PETITION FOR RULE MAKING** to the following:

Ralph Haller, Chief
Private Radio Bureau
Federal Communications Commission
2025 M Street, N.W., Room 5002
Washington, D.C. 20554

Richard J. Shiben, Chief
Land Mobile and
Microwave Division
Private Radio Bureau
Federal Communications Commission
2025 M Street, N.W., Suite 5202
Washington, D.C. 20554

Rosalind K. Allen, Deputy Chief
Land Mobile and
Microwave Division
Rules Branch
Federal Communications Commission
2025 M Street, N.W., Room 5126
Washington, D.C. 20554

Kent Y. Nakamura, Esq.
Private Radio Bureau
Federal Communications Comission
2025 M Street, N.W., Room 5002
Washington, D.C. 20554

*Terry Fishel, Chief
Land Mobile Branch
Licensing Division
Private Radio Bureau
Federal Communications Commission
1270 Fairfield Road
Gettysburg, PA 17325-7245

Lisa K. Jackson

* via Federal Express